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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

HECTOR LEONEL MORALES,

Defendant and Appellant.

G032008

(Super. Ct. No. 02NF3224)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, John J. Ryan, Judge. (Retired judge of the Orange Super. Ct., assigned by the Chief Justice pursuant to Cal. Const., art. VI, § 6.) Affirmed as modified.

Katharine Eileen Greenebaum, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Jeffrey J. Koch and Robert M. Foster, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

A jury convicted Hector Leonel Morales (defendant) of possession of cocaine and methamphetamine for sale. (Health & Saf. Code, § 11378.) Defendant admitted a prior conviction for possession of cocaine base for sale, pursuant to Health and Safety Code section 11370.2, subd. (a). The court imposed a total prison term of seven years: the upper term of four years for possession of cocaine for sale, a concurrent three-year term for possession of methamphetamine for sale, and a consecutive three-year term for the prior conviction enhancement.

Defendant challenges the sufficiency of the evidence he possessed methamphetamine and cocaine for the purpose of sales rather than for his personal use. He also claims the court abused its sentencing discretion by imposing a seven-year term following a jury trial because the prosecution offered to accept a three-year term for a guilty plea prior to trial. We find no merit in either contention. Nevertheless, the judgment must be modified. Defendant asserts, and the Attorney General concedes, the court improperly calculated his presentence custody credits. With this modification, we affirm the judgment.

I

FACTS

We present the facts in the light most favorable to the judgment in accord with established rules of appellate review. (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206; *Bancroft-Whitney Co. v. McHugh* (1913) 166 Cal. 140, 142-143.)

On October 15, 2002, Anaheim police officers detained and arrested defendant at an Anaheim bar on an unrelated arrest warrant. During a search incident to this arrest, officers inspected defendant's socks and discovered three bindles, each containing 225 milligrams of cocaine, in one sock and two bindles, each containing 229 milligrams of methamphetamine, in the other. He also had a total of \$113 in various denominations in his wallet and three cellular telephones, at least one of which was functional.

The prosecution called Anaheim Detective Phillip Vargas as its narcotics expert. Vargas has received over 300 hours of special training in narcotics enforcement. During his career, Vargas worked with street level enforcement and was currently assigned as an investigator in the Major Narcotics Unit for the Anaheim Police Department. He has participated in over 100 narcotics purchases, 40 controlled buys, and conducted over 1,500 narcotics-related investigations. He testified the bindles found in defendant's socks were consistent drug packing. In his opinion, defendant possessed sufficient quantities of each drug to indicate he had the intent to sell those drugs. He estimated the street value of each bindle at \$20 to \$25.

Defendant was arrested in an area known for drug trafficking. Vargas opined that defendant possessed the methamphetamine and cocaine for the purpose of sales, relying on the quantity and packaging of the drugs, the \$113 and the working cellular telephone found on defendant's person, the absence of paraphernalia associated with personal use, and the location of defendant's arrest. Vargas acknowledged that defendant did not possess a pay-owe sheet or additional packing materials such as would be common with drug sales, but stated it is not unusual for a small-time street dealer to forego recordkeeping. Further, Vargas opined that it would be unusual for a person to possess cocaine and methamphetamine for immediate personal use. He further noted that drug dealers tend to separate different kinds of drugs into different colored bags and store them in separate locations, "just to keep track of it for themselves."

II DISCUSSION

Sufficiency of the evidence

Defendant challenges the sufficiency of the evidence to support the jury's conclusion he possessed drugs for the purpose of sales rather than for personal use. In addressing such challenges, "the reviewing court must examine the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence — evidence that is reasonable, credible and of solid value — such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citations.] The appellate court presumes in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence. [Citations.] The same standard applies when the conviction rests primarily on circumstantial evidence. [Citation.]" (*People v. Kraft* (2000) 23 Cal.4th 978, 1053.)

Repeating the argument he made to the jury, defendant points to the absence of certain indicia of drug sales and the relatively small quantity of drugs he possessed as evidence of personal use. However, the fact that evidence "“might also reasonably be reconciled with a contrary finding does not warrant a reversal of the judgment. [Citation.]” [Citation.]” (*People v. Kraft, supra*, 23 Cal.4th at p. 1054.) Defendant possessed several individual bindles. Each bindle contained approximately one-quarter of a gram of either cocaine or methamphetamine. Defendant separated the bindles by drug, placing all bindles containing the same drug in the same sock. He carried cash and had at least one working cellular telephone. He was present in an area known for drug trafficking. Further, although he claimed possession for personal use, defendant possessed none of the paraphernalia associated with personal use of either drug. Under the facts presented, a reasonable jury could conclude defendant possessed cocaine and methamphetamine for sale rather than for his own use.

Sentencing

Prior to the jury trial, the court conducted a probation violation hearing. The court found defendant in violation of probation, terminated probation, and imposed the midterm of four years. At the time, the court stated, “If the defendant wishes to plead guilty to the new offense, the court would sentence him to three years concurrent.” After a brief discussion with his attorney, defendant declined the offer and opted for a jury trial. Ultimately, the court imposed an aggregate term of seven years. Defendant claims the court imposed the seven-year term as punishment for exercising his constitutional right to a jury trial. We disagree.

First, “[t]he mere fact, if it be a fact, that following trial defendant received a more severe sentence than he was offered during plea negotiations does not in itself support the inference that he was penalized for exercising his constitutional rights.” (*People v. Szeto* (1981) 29 Cal.3d 20, 35.) Defendant points us to nothing in the record to support his assertion other than the ultimate sentence imposed.

Second, the court carefully stated its reasons for the imposition of the aggravated sentence: “Okay. I thought the upper term of four years for count I was appropriate. [¶] . . . [¶] . . . I didn’t find anything in mitigation as the crime or the defendant. [¶] . . . [¶] And as to the aggravating or — as to the facts relating to the defendant, he does have a prior record, excluding the prior [Health and Safety Code section] 11351.5 starting in ‘91, and I know there are a lot of deportations in between, but several crimes including dope, weapons, assaults. [¶] . . . [¶] but imprisonment will have no impact on the defendant, on his dependents, and no impact on his life. He has basically led a life of crime since the early ‘90’s and that is why I think the upper term is justified.” Nothing supports defendant’s contention the court sought to punish him for exercising his right to a jury trial. Further, the sentence imposed is clearly within the court’s broad sentencing discretion. (See *People v. Balderas* (1985) 41 Cal.3d 144, 204.) We find no error.

III

DISPOSITION

The trial court is directed to correct the abstract of judgment to reflect that defendant receive 213 total presentence custody credits: 143 actual days and 70 days of conduct credit. The court shall correct the abstract of judgment and forward a certified copy to the Department of Corrections. As modified, the judgment is affirmed. (Pen. Code, § 1260.) In all other respects, the judgment is affirmed.

MOORE, J.

WE CONCUR:

BEDSWORTH, ACTING P. J.

FYBEL, J.